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No. 02-682

Supreme Court, U.S.
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In The
Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR UNITED PARCEL SERVICE, INC., HONEYWELL INTERNATIONAL INC., VISA U.S.A. INC., AND EASTMAN KODAK COMPANY, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an allegation that a firm used monopoly power in one market to gain a competitive advantage in a second market states a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, where there is no allegation that the firm's conduct either monopolized the second market or dangerously threatened to do so.

2. Whether an allegation that a firm with lawfully acquired monopoly power made it difficult for a rival to compete against it by failing to grant the rival access to the monopolist's facilities, on terms and conditions that were as favorable as those enjoyed by the monopolist, states a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2.

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INTEREST OF *AMICI CURIAE*[1]

This case involves two important issues in antitrust law – the validity of a theory known as "monopoly leveraging" and the appropriate scope of the "essential facilities" doctrine. The court of appeals held that respondent's allegations stated a claim against petitioner for relief under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on both theories.

United Parcel Service, Inc. (UPS) provides parcel delivery service throughout the United States and worldwide. UPS competes with a wide array of other carriers, including nationwide carriers, a host of trucking companies and private truck fleets, logistics providers, and numerous regional and local companies across the country.

Honeywell International Inc. (Honeywell) is a diversified technology and manufacturing company that provides customers throughout the United States and worldwide with aerospace products and services, control technologies for buildings, homes and industry, specialty chemicals, fibers, plastics and electronic and advanced materials. Honeywell competes with local, regional, national, and global companies in the many industries that it serves.

Visa U.S.A. Inc. (Visa) is a membership corporation owned by approximately 14,000 banks and other financial institutions located throughout the United States and the world. Visa acts as an umbrella organization for its members, providing advertising services to support the Visa brand and technology services to facilitate Visa payment transactions. Visa also regulates and coordinates certain aspects of its members' individual programs through rules and by-laws adopted by its board of directors. Under this

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk along with this brief, as required under Rule 37.2(a). Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and only the *amici* made a monetary contribution to the preparation and submission of this brief.

umbrella structure, Visa's members issue payment cards to consumers and sign up merchants to accept Visa payment products.

Eastman Kodak Company (Kodak) is a global developer, manufacturer and supplier of imaging products and technologies used by consumers, medical professionals, professional photographers, movie and television producers, government customers and commercial businesses. Kodak operates manufacturing plants, research facilities, distribution centers and business offices throughout the United States.

Because of their nationwide operations, *amici* have a strong interest in the uniform application of the antitrust laws throughout the country, so that their operations and business decisions are not subject to different standards in different jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals' erroneous antitrust rulings will have an impact far beyond the telecommunications industry, which is the context in which the issues in the instant case arise. The antitrust rulings by the court below are independent of the telecommunications statute (*see* Pet. App. 29a, 32a), apply with equal force to every industry, and represent a serious threat to the ability of American businesses to operate efficiently and to maximize consumer welfare.

This case presents important, recurring questions regarding the application of Section 2 of the Sherman Act, 15 U.S.C. § 2, to conduct that does not monopolize or pose a dangerous threat of monopolization in a relevant market. The court of appeals' antitrust rulings sharply conflict with those of other circuits and the teachings of this Court concerning the proper scope of Section 2. Review by this Court would allow it to address substantial uncertainty in antitrust law by resolving a conflict in the circuits about the Second Circuit's "monopoly leveraging" theory, and resolving conflicting interpretations of the scope of the "essential facilities" doctrine.

A. The court of appeals held that respondent may state a claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on its allegations that Verizon has monopoly power over the wholesale market (where it sells access to its wires), that Verizon used that power to "gain a competitive advantage" in the retail market (where carriers sell local telephone service to customers), and that such conduct purportedly injured respondent. *Id.* at 30a-31a. That ruling revives the so-called "monopoly leveraging theory," which is rooted in the Second Circuit's earlier decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275, 291-293 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The courts of appeals are deeply divided on the question whether an allegation that a firm used monopoly power in one market to "gain a competitive advantage" in a second market states a claim under Section 2 of the Sherman Act. Some courts of appeals have followed the Second Circuit. Other circuits, however, have expressly rejected the theory, concluding that it is contrary to the text and purpose of Section 2, which makes it unlawful only for a person to "monopolize, or attempt to monopolize, or * * * conspire * * * to monopolize" a particular market. 15 U.S.C. § 2. Those courts have determined that "gain[ing] a competitive advantage" does not satisfy that requirement. The Second Circuit's monopoly leveraging theory also is inconsistent with this Court's precedents regarding the scope of Section 2. In *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), the Court emphasized that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id.* at 459.

B. The court of appeals also held that respondent may state a Section 2 claim under the essential facilities doctrine based on its allegation that Verizon intended to exclude competition "by making it difficult for its competitors to provide services in the Local Phone Service market on the level that [Verizon] is able to provide to its customers in that market," and had no valid business reason for doing so. Pet. App. 6a-7a (quoting Amended Complaint ¶ 52).

That expansive application of the essential facilities doctrine cannot be reconciled with this Court's Section 2 jurisprudence (which has never endorsed the doctrine), or with the application of the essential facilities doctrine by other circuits. The court of appeals' ruling indicates that, as a matter of antitrust law, an alleged monopolist may have to create a wholesale market in its own products in order to allow rivals to purchase and then resell those products in competition with the monopolist in the retail market. That is what the Seventh Circuit correctly recognized is not required by the antitrust laws, *see Goldwasser v. Ameritech*, 222 F.3d 390 (7th Cir. 2000), as other courts have previously held. Moreover, to the extent the court's ruling is read to mean that a plaintiff may claim that an alleged monopolist has a duty under Section 2 to provide access to its facilities to a competitor who is finding it "difficult" to compete, Pet. App. 6a-7a, that ruling suggests that facilities may be considered "essential" merely because it would be expensive or inconvenient for a rival to construct its own facilities. But other courts have held that a facility is "essential" only where it cannot be duplicated due to the fact that the monopoly is a natural monopoly, is legally protected from competition, or is publicly subsidized. Also, other courts have limited the essential facilities doctrine to situations where, absent access to the facility, the competitor cannot compete at all, and have rejected mere difficulty in competing as sufficient to justify application of the doctrine.

C. By extending the reach of Section 2 to conduct that is, in fact, pro-competitive, the court of appeals' decision undermines the fundamental purpose of the antitrust laws – the promotion of vigorous competition. The court of appeals' rule will discourage firms from building efficiently scaled facilities and competing aggressively because competitive success will mean that they must share their business assets with less efficient rivals. Smaller rivals will have no reason to develop

improved products and services to compete with a monopolist if they can obtain access to the larger firm's facilities without doing so.

The consequences of the monopoly leveraging and essential facilities rulings by the court below extend far beyond the field of telecommunications law. The adverse impact of those rulings is evident, particularly in light of the court's other holding that any consumer may bring such claims on the barest of allegations, *see* Pet. 23-26, thus clearing the way for burdensome class actions that will require private parties and the federal judiciary to bear the high costs of litigating lengthy and complex antitrust claims even where there is no allegation (much less proof) of monopolization or a genuine threat thereof. Review of the antitrust issues by this Court is of particular importance to businesses like *amici* that participate in nationwide markets and operate in many jurisdictions. Absent review by this Court, the circuit conflicts on the antitrust issues will subject such firms to disparate standards in different States.

ARGUMENT

REVIEW BY THIS COURT IS WARRANTED BECAUSE THE COURT OF APPEALS' OPINION CONFLICTS WITH RULINGS BY THIS COURT AND SEVERAL OTHER CIRCUITS REGARDING IMPORTANT ANTITRUST DOCTRINES AND BECAUSE THE APPLICATION OF DIFFERENT ANTITRUST STANDARDS IS DISRUPTIVE TO THE MANY BUSINESSES THAT OPERATE IN MULTIPLE JURISDICTIONS

A. The Court Of Appeals' Monopoly Leveraging Theory Conflicts With The Decisions Of Several Other Circuits And Is Inconsistent With This Court's Precedents Regarding The Scope Of Section 2 Of The Sherman Act

The decision below revives a conflict in the circuits over whether an allegation that a firm used monopoly

power in one market as leverage to gain a *nonmonopolistic* competitive advantage in a second market, *i.e.* "monopoly leveraging," states a claim for violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Several courts of appeals have held, contrary to the court below, that such an allegation does not state a Section 2 claim because the text of Section 2 makes it unlawful only for a person to "monopolize, or attempt to monopolize, or * * * conspire * * * to monopolize" a particular market. 15 U.S.C. § 2; 15 U.S.C. § 15(a).

The monopoly leveraging theory applied by the Second Circuit below is rooted in its earlier decision in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275, 291-293 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The court there recognized the well-established antitrust doctrine that "a firm may not employ its market position as a lever to create or attempt to create a monopoly in another market," and held that that doctrine did not apply in the case before it because the defendant "was never close to gaining control" of the second market. *Id.* at 275 (citing *United States v. Griffith*, 334 U.S. 100 (1948)). The court, nonetheless, also declared that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, *even if there has not been an attempt to monopolize the second market*." *Berkey*, 603 F.2d at 276 (emphasis added).

The Sixth Circuit adopted the Second Circuit's theory in *Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc.*, 854 F.2d 135, 137 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989). The Eleventh Circuit recently cited *Berkey* approvingly as well. *See Covad Communications Company v. BellSouth Corp.*, 299 F.3d 1272, 1284 (11th Cir. 2002).

Other circuits, however, have flatly rejected the theory. The Ninth Circuit has disagreed with *Berkey Photo* outright, holding that "[e]ven in the two-market situation, a plaintiff cannot establish a violation of Section 2 without proving that the defendant used its monopoly power in one market to obtain, or attempt to obtain, a monopoly in the downstream, or leveraged, market." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), *cert. denied*, 5023 U.S. 977 (1992).

The Third Circuit similarly rejected the theory, holding that a plaintiff "may not advance a leveraging claim under [S]ection 2 premised upon [the defendant's] having attained a mere competitive advantage in the relevant * * * market." *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 203 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993). The court explicitly declined to follow *Berkey* because that "formulation of monopoly leveraging to proscribe unilateral restraints of trade does violence to the text of the Sherman Act" which, the court explained, "does not proscribe anti-competitive unilateral conduct that falls shy of threatened monopolization." *Id.* at 205. The court noted (*ibid.*) that that fact "was succinctly set forth" in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 (1984). In *Copperweld*, this Court explained that Section 1 of the Sherman Act applies to conduct by two or more firms acting in concert and prohibits unreasonable restraints of trade in such instances, but Section 2 applies only to unilateral conduct and "*leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization)* that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Copperweld*, 467 U.S. at 774.

This Court's decision in 1993 in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, provided further support for rejection of *Berkey*'s monopoly leveraging theory. Although *Spectrum Sports* did not address monopoly leveraging directly, it confirmed the limited reach of Section 2. The Court reversed a lower court ruling that a plaintiff in an attempted monopolization suit was not required to prove that there was a dangerous threat of monopolization of the market by the defendant. *Id.* at 457. The Court explained that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so," and that this standard "is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics." *Id.* at 459; *see also Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S.

209, 225 (1993). The Court emphasized the need to avoid construing Section 2 to "chill competition, rather than foster it." *Id.* at 458. *See also Copperweld Corp.*, 467 U.S. at 768 ("Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.").

Subsequent to *Spectrum Sports*, another circuit rejected the Second Circuit's monopoly leveraging theory. In *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198, 206 n.16 (5th Cir. 2000), the Fifth Circuit overturned a jury verdict on a Section 2 violation because it was based on an instruction that allowed the finding of a Section 2 violation if defendants used monopoly power " 'to gain a competitive advantage,' even if the defendants did not attempt to monopolize the second market."

The Second Circuit itself had openly questioned the continuing validity of its monopoly leveraging theory in light of *Spectrum Sports*, absent a genuine threat of monopolization. In *AD/SAT v. Associated Press*, 181 F.3d 216, 230 (2d Cir. 1999), the court ruled that, "[w]hatever the continued scope of monopoly leveraging claims as independent causes of action," it was clear that the plaintiff in that case had not presented evidence to support such a claim. In support of its characterization of the uncertain status of the monopoly leveraging theory, the court cited *Spectrum Sports* and quoted this Court's statement that "[Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Ibid.* (quoting *Spectrum Sports*, 506 U.S. at 459). Other decisions of the Second Circuit also had limited *Berkey Photo*. *See Virgin Atlantic Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001) (noting that it had questioned *Berkey Photo* in earlier decisions and stating that *Spectrum Sports* requires more than a showing that the monopolist "gain[ed] a competitive advantage"); *Twin Labs., Inc. v. Weider Health and Fitness*, 900 F.2d 566, 570-571 (2d Cir. 1990) (indicating that the relevant statement from *Berkey Photo* was dicta and ruling that "tangible harm to competition" is required).

Both before and after *Spectrum Sports*, numerous courts have recognized the disagreement among the circuits regarding the monopoly leveraging theory. No less than four other circuits have noted, but declined to resolve, the question. *See, e.g., Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1359-1360 (Fed. Cir. 1999) (discussing different approaches of various circuits and vacating injunction because it could not be supported on a theory of illegal leveraging); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc.*, 63 F.3d 1540, 1551 n.8 (10th Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996) (recognizing split in the circuits on issue, but not reaching question because it found that plaintiff stated claim for attempted monopolization); *M&M Medical Supplies & Serv., Inc. v. Pleasant Valley Hosp., Inc.*, 981 F.2d 160, 168-169 (4th Cir. 1992) (en banc), *cert. denied*, 508 U.S. 972 (1993) (expressly reserving judgment on question of the validity of the monopoly leveraging theory and assuming for purposes of remand that it is a separate Section 2 violation); *Advanced Health Care Services, Inc. v. Radford Cmty. Hosp.*, 910 F.2d 139, 149 (4th Cir, 1990) (assuming that monopoly leveraging is an independent Section 2 violation, but "reserv[ing] definitive resolution" of the issue); *Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam) (emphasizing that it "merely assume[d] for purposes of argument, and [did] not affirm, the legal sufficiency of the leveraging offense described in *Berkey Photo*"; reserving judgment on question in light of "substantial academic criticism cast upon the leveraging concept") (citing *e.g.*, Richard A. Posner & Frank H. Easterbrook, *Antitrust* 802-810, 870-877 (2d ed. 1981); Robert Bork, *The Antitrust Paradox* 365-366, 372-375 (1978)); *see also Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1203 (3d Cir. 1995) (noting that leveraging arguments "have come under increasing attack as economically groundless").

In sum, the Second Circuit's decision in the instant case has reinvigorated the discredited monopoly leveraging theory, in direct conflict with the precedent of at least three other circuits; cannot be reconciled with this Court's precedents; and is creating confusion in the lower courts. Yet, the Second Circuit failed to explain its decision to revive the theory or its basis for disagreeing with the reasoning of several other circuits, despite the Second Circuit's own recent limiting decisions. The Second Circuit's reliance on the theory despite the inconsistencies in its own jurisprudence indicates that it is unlikely that the circuit conflict will be resolved absent review by this Court. The fact that the circuit split will endure unless the Court grants review is further confirmed by the Eleventh Circuit's recent reliance on *Berkey Photo* in approving the monopoly leveraging theory in *Covad Communications Company v. BellSouth Corp.*, 299 F.3d 1272, 1284 (11th Cir. 2002). This Court should grant the petition to resolve the disagreement among the courts below, especially in light of the importance of the issue to businesses operating in nationwide markets, as noted below. *See* pp. 16-19, *infra*.

B. The Court Of Appeals' Application Of The Essential Facilities Doctrine Conflicts With The Decisions Of Several Other Circuits And Expands That Doctrine Beyond The Scope Of Section 2 Of The Sherman Act

The court of appeals' application of the essential facilities doctrine in the instant case also creates a conflict with other circuits regarding the proper reach of that doctrine and cannot be reconciled with this Court's recognition that Section 2 prohibits only conduct that monopolizes or dangerously threatens to do so.

The court of appeals' ruling is of particular significance because the essential facilities doctrine, even when limited by other courts, has "been criticized as having nothing to do with the purposes of the antitrust law." *Blue Cross v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995) (Posner, J.), *cert. denied*, 516 U.S. 1184 (1996); *see* 3A Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 771c, at 173 (2d ed. 2002) ("Lest there be any doubt, we state our belief that the essential facility doctrine is both harmful and unnecessary and should be abandoned"). It is a doctrine "that this Court has never adopted." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985) (finding it "unnecessary to consider the possible relevance of the 'essential facilities' doctrine" and analyzing case under the traditional rubric of Section 2). The court of appeals' ruling below expands that questionable doctrine by broadening the scope of the conduct that is subject to challenge, as well as the scope of facilities that are considered essential.[2]

1. The court of appeals' ruling extends the essential facilities doctrine beyond the reach of Section 2 of the Sherman Act

Focus on the proper scope of Section 2 highlights the extent to which the court of appeals departed from established antitrust doctrine and thereby both failed to adhere to this Court's precedents and created conflicts with

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[2] Petitioner demonstrates that the court of appeals' broad standing ruling presents a circuit conflict. Pet. 23-26. The court's specific ruling that an essential facilities claim can be brought under the Clayton Act by a "consumer plaintiff," "regardless of whether the consumer plaintiff is a competitor of the defendant," Pet. App. 30a n.12, also conflicts with the District of Columbia Circuit's rule that an essential facilities claim may be brought only by a competitor of the monopolist, not by a customer. *See Thomas v. Network Solutions Inc.*, 176 F.3d 500, 509-510 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000); *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless Plc*, 148 F.3d 1080, 1088-1089 (D.C. Cir. 1998); *see also* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771a, at 171 ("the general rule [is] that only rivals of the defendant have standing to sue" on an essential facilities claim).

numerous other circuits regarding the essential facilities doctrine.

This Court has repeatedly recognized that Section 2 prohibits only monopolization achieved through anticompetitive practices, not monopoly power acquired or maintained through "a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). And Section 2 does not prohibit a monopolist that acquired its monopoly through such lawful means from charging a monopoly price for its product or service. *Blue Cross*, 65 F.3d at 1413; 3 Areeda & Hovenkamp, *Antitrust Law* ¶ 720a, at 254-256. That is because monopoly pricing does not foreclose competition by others. To the contrary, as the Court recognized in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986), "monopoly pricing may breed quick entry by new competitors eager to share in the excess profits." Moreover, if successful firms were forced to surrender the fruits of their legitimate, competitive activities, companies would have far less economic incentive to compete aggressively to increase their market shares, *see, e.g.*, *Illinois v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1481 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), and such dampening of competition would ultimately harm consumers whom the antitrust laws are intended to benefit. *See Copperweld Corp.*, 467 U.S. at 767.

Section 2 also does not impose on a monopolist a general duty to deal with its competitors, potential competitors, or customers. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). That is because "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986) (citation omitted). The purpose of the antitrust laws, after all, "is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports*, 506 U.S. at 458.

What Section 2 does prohibit is firms engaging in conduct that results in the acquisition or maintenance of monopoly power, or genuinely threatens to create monopoly power, by excluding competition "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605. Whatever the merits of the essential facilities doctrine (*see* pp. 10-11, *supra*), it cannot reach conduct that does not meet the criteria for monopolization or attempted monopolization under Section 2. As the Court has emphasized, "it [is] not enough to inquire 'whether the defendant has engaged in "unfair" or "predatory" tactics'" that "may impose painful losses on the target"; "rather, we insist[ ] that the plaintiff prove a 'dangerous probability that [the defendant] would monopolize a particular market.'" *Brooke Group*, 509 U.S. at 224-225 (citation omitted).

The court of appeals' contrary conclusion reveals a critical flaw in its reasoning. The court characterized respondent's separate claim for attempted monopolization (which the court dismissed) as "derivative of the monopoly leveraging and essential facilities claims." Pet. App. 31a n.13. But monopoly leveraging and essential facilities are merely labels used to describe particular conduct that some courts have held may give rise to a Section 2 violation in certain circumstances. The court of appeals' erroneous ruling that a plaintiff can bring a claim under the essential facilities doctrine (and monopoly leveraging theory) based on alleged conduct that does not monopolize or attempt to monopolize, cannot be reconciled with rulings by this Court and other lower courts that such conduct is beyond the reach of Section 2. *Spectrum Sports*, 506 U.S. at 459.

2. The court of appeals' ruling cannot be reconciled with the essential facilities doctrine as applied in several other circuits

The court of appeals' decision below expands the scope of the essential facilities doctrine, contrary to the rulings of several other circuits.

a. The court of appeals found an essential facilities claim sufficiently stated by respondent's allegations that

Verizon's "conduct had no valid business reason and was intended to exclude competition from the market 'by making it difficult for its competitors to provide service in the Local Phone Service market on the level that [Verizon] is able to provide to its customers in that market.'" Pet. App. 6a-7a (quoting Amended Complaint ¶ 52). The court specified that the claim did not arise out of duties imposed by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 61, because the claim did not cite the relevant statutory provision, 47 U.S.C. § 251. The court indicated that the claim arose out of duties imposed by Section 2 of the Sherman Act. *See* Pet. App. 29a (acknowledging that alleged conduct might also violate Section 251).

That ruling unduly expands the conduct subject to an essential facilities claim. First, no court has held that Section 2 requires a monopolist to provide a competitor access to its facilities in order to create competition in the monopoly market. *See, e.g.*, *Panhandle Eastern Pipe Line*, 935 F.2d at 1484 ("penaliz[ing] the monopolist for refusing to surrender a lawfully obtained monopoly" is "a result courts have long foresworn"). But that is what the ruling below does because, prior to the Telecommunications Act of 1996, Verizon sold local telephone services only at retail. The 1996 Act's duties are what require Verizon to create a wholesale market in which it must sell its services to competitors so that they may resell those services at retail, in competition with Verizon. Now the court of appeals has declared that, as a matter of antitrust law, an alleged monopolist may have to create a wholesale market in its own products in order to allow rivals to purchase and then resell those products in competition with the monopolist in the retail market. That is what the Seventh Circuit correctly recognized in *Goldwasser* is not required by the antitrust laws. *See Goldwasser*, 222 F.3d at 398 ("even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor") (quoting *Aspen Skiing*, 472 U.S. at 600). Although other courts have recognized that the essential facilities doctrine, at best, holds that a monopolist may not use its position in its

monopoly market to prevent competition in a separate market, those courts have not required a monopolist to engage in affirmative conduct to create competition in its monopoly market (as the 1996 Act does). *E.g.*, *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1133, 1148-1149 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983) (requiring AT&T to give MCI access to its local telephone network so as to enable MCI to compete in the long-distance market (not in the local telephone market), but denying MCI's claim for access to AT&T's long-distance network even though such access also would improve MCI's ability to compete in long-distance market).

Second, to the extent the court's ruling is read to mean that a plaintiff may claim that an alleged monopolist has a duty under Section 2 to provide access to its facilities to a competitor who is finding it merely "difficult" to compete on the same level, Pet. App. 6a-7a, that ruling is inconsistent with decisions of other courts. Those courts have limited the essential facilities doctrine to situations where, absent access to the facility, the competitor cannot compete at all (and only, as noted above, when the competitor is foreclosed from competing in a secondary market); they have rejected mere difficulty in competing as sufficient to trigger the essential facilities doctrine. *See Alaska Airlines*, 948 F.2d at 545-546; *City of Chanute v. Williams Natural Gas*, 955 F.2d 641, 648-649 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992), *overruled in part on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc); *Laurel Sand & Gravel, Inc. v. CSX Transportation, Inc.*, 924 F.2d 539, 544-545 (4th Cir.), *cert. denied*, 502 U.S. 814 (1991); *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 370-371 (10th Cir. 1988), *overruled in part on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc).

b. The ruling below also unduly expands the scope of facilities that are considered to be essential. The court of appeals held that respondent stated a Section 2 claim for relief under the essential facilities doctrine based, in the court's words, on an allegation that "creating independent facilities would be prohibitively expensive." Pet. App. 29a.

Respondent couched its allegations in less burdensome terms. *See* Amended Complaint ¶¶ 2, 19, 20, 51 (alleging that access to Verizon's facilities is "important," and that compelled access would make it "easier and cheaper" for competitors to compete because duplicating the facilities would be "expensive" and "time-consuming").

Other courts have held, however, that a facility is essential only where it cannot be duplicated because the monopoly is a natural monopoly, is legally protected from competition, or is publicly subsidized. For example, in *MCI*, 708 F.2d at 1133, the court found that access to the local telephone exchange was essential to competition in the long-distance market because it could not be duplicated due to the existence of a natural and legally protected monopoly, not because duplication would have been expensive or time-consuming. *See also Hecht v. Pro-Football*, 570 F.2d 982, 985-987, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) (publicly subsidized stadium); *cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 371 (1973) (facilities depended on exclusive government grants); 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 773b, at 202.

C. The Court of Appeals' Antitrust Rulings Are Contrary To the Purposes of Section 2 of the Sherman Act And Require Review By This Court To Prevent Economic Disruption To The Many Firms That Operate On A Nationwide Basis

The court of appeals' monopoly leveraging theory outlaws certain conduct that merely gives an alleged monopolist a "competitive advantage" in a second market. That theory finds no support in the text of the statute, as demonstrated above. The court of appeals' standard also is inconsistent with the purposes of Section 2 because monopolists and other firms with large market shares often gain a "competitive advantage" through actions that are pro-competitive. For example, firms use vertical integration to lower their costs, and therefore their prices, in a second market, and to provide integrated products that

are more valuable to the consumer. *See, e.g.*, Posner & Easterbrook, *Antitrust*, at 869 ("vertical integration is a potential source of substantial cost savings"). Under the Second Circuit's rule, a plaintiff may allege that such conduct violates Section 2, even though the conduct benefits consumers, on the ground that it harms a competitor by placing it at a competitive disadvantage. The Court has repeatedly warned against the dangers of such rules, which "chill the very conduct the antitrust laws are designed to protect." *Brooke Group*, 509 U.S. at 226 (quoting *Cargill*, 479 U.S. at 122 n.17, and *Matsushita*, 475 U.S. at 594).

Similarly, the court of appeals' expansion of the essential facilities doctrine to require an alleged monopolist to provide competitors with access to its facilities in order to improve the competitors' ability to compete in the monopoly market is contrary to the purposes of Section 2 and will not lead to reduced prices that benefit customers. "[C]onsumers are no better off when [an essential facility] is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771b, at 171-172 (explaining why essential facilities doctrine is "inconsistent with antitrust's purpose"). Lower prices would result only if the court also took on the role of regulator to set the price at which the access must be sold. But "[s]uch a solution is nothing less than price regulation of the kind undertaken by regulatory agencies – something for which both the federal courts and the antitrust litigation process are extremely ill-suited." *Id.* at 172. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991).

The court of appeals' rule will discourage firms from building efficiently scaled facilities and competing aggressively because competitive success will mean that they must share their business assets with less efficient rivals; nor will companies "undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those

innovations will be dissipated by the sharing requirement." *AT&T Corp.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part); *see also* 3A Areeda & Hovenkamp, *Antitrust Law* ¶ 771b, at 172. Likewise, smaller rivals will have no reason to develop improved products and services to compete with a monopolist if they can obtain access to the larger firm's facilities without doing so. Indeed, broad application of the essential facilities doctrine may lead to too much cooperation among competitors – a result that the antitrust laws uniformly condemn. *See, e.g., Copperweld*, 467 U.S. at 767-768.

The consequences of the monopoly leveraging and essential facilities rulings by the court below extend far beyond the field of telecommunications law. The court of appeals' ruling that allows entities other than competitors to bring such claims will lead to a torrent of class action claims in many sectors of the economy by consumers who are not directly injured, if they are injured at all, particularly in light of recent application of the ruling by lower courts. *See, e.g., Yankees Entertainment & Sports Network, LLC v. Cablevision Sys. Corp.*, No. 02-Civ-3242, 2002 WL 31010490, *9, *31-*32, *38-*42 (S.D.N.Y. Sept. 4, 2002) (expressly relying on Second Circuit's decision in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that a cable operator refused to grant a regional sports programming "carriage on its system on nondiscriminatory terms such as those terms and conditions available to its affiliates," which caused the latter to have fewer viewers and less revenue); *In re EVIC Class Action Litigation*, No. 02-Civ-2703, 2002 WL 1766554, at *12-*14 (S.D.N.Y. July 30, 2002) (expressly relying on Second Circuit's decision in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that UPS offered package insurance to its customers, but denied other potential package insurers access to the shipping forms and software that UPS provides to its customers); *see also* Pet. 28 n.22 (indicating that "[f]ollowing the Second Circuit's decision, Verizon and other incumbent local telephone companies have been subjected to no fewer than 25 class actions in New York, Connecticut, Georgia, and Colorado").

Review of the antitrust issues by this Court is of particular importance to businesses like *amici* that participate in nationwide markets and operate in many jurisdictions. In light of the deep divisions in the lower courts, only this Court's review can ensure that the operations of firms are not subject to disparate standards in different States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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